

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

LARRY ANDREW PIATEK,

Plaintiff,

Case No. 04-C-851

v.

DAVID GRAVES, KURT PICKNELL,
MICHAEL SCHMITZ, JOHN DELANEY,
KEVIN HURST, HEALTH PROFESSIONALS,
LTD., ELIZABETH PETERS, BRIAN BOHLMANN,
DAVID BJORGE, ESSEX INSURANCE COMPANY
and WISCONSIN COUNTY MUTUAL
INSURANCE COMPANY,

Defendants.

OPINION AND ORDER

Larry Andrew Piatek, a prisoner in state custody, is suing employees of the Walworth County (Wisconsin) Jail and medical personnel under contract to Walworth County for violating his civil rights while in custody. He is seeking money damages pursuant to 42 U.S.C. § 1983. The Walworth County Defendants answered and have denied liability. The medical Defendants have moved to dismiss on the ground that Piatek failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e.

The Seventh Circuit has ruled that failure to exhaust pursuant to section 1997e is an affirmative defense. Thus, the Defendants have the burden of proving that specific administrative remedies were available to Piatek and that he did not exhaust these remedies. See Dale v. Lappin, 376 F.3d 652, 656 (7th Cir. 2004). The movants

have yet to plead this affirmative defense. Therefore, the motion to dismiss is inappropriate. See Walker v. Thompson, 288 F.3d 1005, 1009 (7th Cir. 2002).

For this reason, the court ORDERS that “Defendants Health Professionals, Ltd., Elizabeth Peters, Dr. Brian Bohlmann and Essex Insurance Company’s Rule 12(b)(6) Motion to Dismiss the Plaintiff’s Amended Complaint” (filed June 2, 2005) IS DENIED without prejudice.

IT IS FURTHER ORDERED that the movants shall serve and file an Answer within eleven days of the date of this Order.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 14th day of July, 2005.

s/ Thomas J. Curran
Thomas J. Curran
United States District Judge